CMI-Dearborn, Inc. *and* West Michigan Local No. 275, International Brotherhood Of Electrical Workers, AFL–CIO *and* Eugene M. Crowder, Jr. Cases 7–CA–39722, 7–CA–40639,[1] and 7–CA–40660

February 26, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On August 12, 1998, Administrative Law Judge David L. Evans issued the attached decision. The Respondent and the Charging Party Union filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondent, CMI-Dearborn, Inc., Dearborn, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified below.

1. Delete paragraphs 1(b) and (c) of the judge's recommended Order and reletter the subsequent paragraphs.

2. Delete paragraphs 2(a), (b), (c), and (d) of the judge's recommended Order and reletter the subsequent paragraphs.

3. Substitute the attached notice for that of the administrative law judge.

[1] On October 9, 1998, subsequent to the issuance of the judge's decision, the Board granted the Charging Party Union's request to withdraw the charge in Case 7–CA–40233 based on the parties' entry into a non-Board settlement of that case, severed that case, and dismissed the complaint allegations in that case.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent's May 8, 1997 letter violated Sec. 8(a)(1) of the Act, Members Fox and Liebman rely also on the Board's recent decision in *Greenfield Die & Mfg. Corp.,* 327 NLRB No. 52, slip op. at. 2 (1998), issued after the judge's decision in this case.

Member Hurtgen does not find that the May 8, 1997 letter violated Sec. 8(a)(1) because there is no timely filed charge to support this allegation. In his view, this allegation and the September 19, 1997 charge alleging the August 28, 1997 discharge of employee Martin Sidock because of his union and other protected concerted activities are not closely related.

[3] We shall modify the recommended Order and notice to reflect the withdrawal of Case 7–CA–40233.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT request that you report contacts that include lawful organizational campaign activities on behalf of West Michigan Local No. 275, International Brotherhood of Electrical Workers, AFL–CIO, or any other labor organization.

WE WILL NOT interrogate you about your union activities or the union activities of your fellow employees.

WE WILL NOT convey to you the impression that we have been conducting surveillance of your union activities.

WE WILL NOT threaten you with plant closure if you select the Union as your collective-bargaining representative.

WE WILL NOT solicit your grievances in an effort to dissuade you from selecting the Union as your collective-bargaining representative.

WE WILL NOT remedy grievances that we solicit from you in an effort to dissuade you from selecting the Union as your collective-bargaining representative.

WE WILL NOT threaten you with death because you have engaged in protected concerted activities under the Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

CMI-DEARBORN, INC.

Thomas W. Doerr, Esq., for the General Counsel.
Paul Kara and *Anthony Comden, Esqs.,* of Grand Rapids, Michigan, for the Respondent.
Ray Simmons, of Cooperville, Michigan, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Grand Rapids, Michigan, on March 31 and April 1

and 2, 1998. On April 16, 1997,[1] West Michigan Local No. 275, International Brotherhood of Electrical Workers, AFL–CIO (the Union) filed the charge in Case 7–CA–39722; on September 19, the Union filed the charge in Case 7–CA–40233; and on February 6, the Union filed the charge in Case 7–CA–40639. On February 12, Eugene M. Crowder, an individual, filed the charge in Case 7–CA–40660. All of the charges, and certain amendments thereto, allege unfair labor practices under the Act by CMI-Dearborn, Inc. (the Respondent). Based on those charges and amended charges, the General Counsel issued the following complaints: (1) on July 16, a complaint and notice of hearing; (2) on November 14, an order consolidating cases, amended consolidated complaint and notice of hearing; and (3) on March 18, an order consolidating cases, second amended consolidated complaint and notice of hearing. (These instruments will collectively be referred to as the complaint.) The Respondent admits that the National Labor Relations Board (the Board) has jurisdiction of this matter, but it denies the commission of any unfair labor practices.

On the testimony and exhibits entered at trial,[2] and on my observations of the demeanor of the witnesses,[3] and after consideration of the briefs that have been filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

As it admits, Respondent is a corporation with an office and place of business in Montague, Michigan (Respondent's Montague facility or plant), where it is engaged in the manufacture and nonretail sale of automotive parts. In the course of these business operations, Respondent annually purchases and receives at its Montague facility goods valued in excess of $50,000 directly from suppliers located at points outside Michigan. Therefore, at all material times Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondent further admits, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that in violation of Section 8(a)(3) Respondent discharged employees David Majeski and Martin Sidock because of their union activities, and the complaint further alleges that Respondent separately violated Section 8(a)(1) by discharging Sidock also because of his protected concerted activity of complaining about the administration of Respondent's wage incentive program. Respondent denies that its supervisors knew of any union activities or sympathies of Majeski or Sidock at the time of their discharges. Respondent further answers that it discharged Majeski solely because he had been convicted of a sex crime. Respondent admits that Sidock was discharged because of his wage complaints, but it denies that those complaints were either concerted or protected. Ultimately, I find and conclude that Respondent did not discharge either Majeski or Sidock because of their union activities, but I further find and conclude that Respondent violated Section 8(a)(1) by discharging Sidock because of his protected concerted activities.

A. Majeski's Case

1. Evidence offered by the General Counsel

a. Background

Respondent is 1 of 13 corporations that are subsidiaries of CMI International, Inc., which is located in Southfield, Michigan. Ray Witt is the majority shareholder of CMI International, and he is its chairman of the board. William Roberts is vice president of human resources of CMI International. Peter Curcio is the director of industrial relations for CMI International. Curcio and Roberts have their offices in Southfield where Curcio reports to Roberts. David Cook is the plant manager at the Montague facility. Harold Pothoff was the plant's human resources manager until February 9; Gary Pufpaff was the plant's superintendent until February 12. Rick Merrill, Scott McCarthy, and Bill Carte are the plant's first-level supervisors (sometimes referred to in the testimony as foremen or "coaches"). About 150 production and maintenance employees work at Respondent's Montague plant.

Majeski testified that in 1996 he had sought to organize the employees for a union. Among the employees whom he solicited was Carte who was then not a supervisor. At the time, further according to Majeski, Carte indicated that he would be interested in being represented by a union.

Montague is in Muskegon County, Michigan. In the Muskegon Sunday newspaper of March 16, 1997, there appeared a picture-page article entitled "*Sex Crimes and Criminals—The Faces of Muskegon's Sex Offense Problem.*" In the center of the page, within a heavy border, the article states:

> Fifty-one men were convicted of at least one felony or high-court misdemeanor sex crime in Muskegon County's 14th Circuit Court last year. Some of the cases made headlines, others didn't. Their crimes included rape, molestation and so-called "nuisance" offenses such as chronic indecent exposure, records show. . . .
>
> Michigan law ranks sex crimes generally into four categories—first through fourth degrees of criminal sexual conduct [CSC].

The article then describes Michigan's CSC-1 through CSC-4 sex crimes. According to the article, a CSC-1 offense is rape; it is punishable by life imprisonment. A CSC-2 offense is a crime of sexual touching when the victim is under 13 years old; it is punishable by up to 15 years' imprisonment. A CSC-3 offense involves penetration or force when the victim is between 13 and 16 years old; it is also punishable by up to 15 years' imprisonment. A CSC-4 offense is described by the article as: "[A] crime of sexual touching. It is a misdemeanor punishable by up to two years' imprisonment." Displayed with the newspaper article are mug shots of 50 of the 51 convicted sex offenders mentioned in the article (one mug shot being unavailable). Beneath each mug shot is the name of a convicted sex offender, his address (by town only), his date of birth, his conviction, and his sentence. One of the mug shots is that of Majeski. Below Majeski's name, address, and date of birth is stated: "Crime CSC-4—attempted. Jail term 0 [zero] months; two years probation; 12 months tether." A tether is an elec-

[1] All dates hereafter mentioned are between April 1, 1997, and March 31, 1998, unless otherwise indicated.

[2] Certain passages of the transcript have been electronically reproduced. Some corrections to punctuation have been entered. Where I quote a witness who restarts an answer, I sometimes eliminate some of the redundant words; e.g., "Doe said, he mentioned that becomes "Doe mentioned that."

[3] Credibility resolutions are based on the demeanor of witnesses and any other factor that I may mention.

tronic ankle band by which probation authorities can monitor the whereabouts of an individual. At trial, Majeski acknowledged that on July 31, 1996, he pleaded *nolo contendere* to, and was convicted of, two CSC-4 offenses. Majeski further admitted that on September 3, 1996, he was sentenced as described by the newspaper article.

Majeski testified that in 1996 (and for several years before) he was going through various divorce and child support proceedings. Majeski testified that he discussed these proceedings with Pothoff several times. In April 1996, he was awarded legal custody of his three children. At the time, he already had physical custody, but the decree had the effect of stopping a child support garnishment that had continued to go to his exwife. The day after the support decree issued, his exwife's sisters charged him with felony and misdemeanor sex offenses against them for acts that they alleged to have taken place 7 years before. After the criminal charges were filed, some police officers came to the plant to arrest Majeski. Majeski was not there, but the next day Pothoff asked him what was going on. Majeski told Pothoff about the custody award and the charges that had been filed. Majeski further testified that Pothoff replied, "Boy, your divorce will never be over, will it?"

Majeski further testified that while the criminal charges were pending against him he spoke to Cook because he had been issued a shift change that would cause a hardship. At the time, according to Majeski, "[B]basically I broke down, told him that my ex-wife had got her sisters together and were accusing me of crimes, which I told him one was a CSC-2 and another one was a CSC-4, and I told him that—I told him everything about that." On the day after his sentencing, he returned to Pothoff and told Pothoff that, because of the tether arrangement, he would need advance notice if his shift was to be changed. Pothoff told Majeski to tell his foremen. Majeski met with Merrill and McCarthy, together, the next day. He told Merrill and McCarthy about the tether arrangement and also told them that he would need advance notice of any shift change so that he could notify his probation officer. Majeski asked Merrill and McCarthy if they wanted to know why he was on a tether. McCarthy replied, "No, we know it's about your ex-wife trying to get custody of your kids." Majeski further testified that he freely spoke to fellow employees in the plant about the charges by his former sisters-in-law, his plea, his probation, and the necessity of the tether.

b. Majeski's discharge

Majeski testified that he started his 1997 union activities on April 2 by collecting signatures and telephone numbers of approximately 30 employees at the plant. Majeski further testified that on April 3 he asked Carte if he was still interested in being represented by a union, but Carte replied that he was then in management and that "he wanted nothing to do with it." Carte did not testify and this testimony by Majeski is therefore undenied.

Majeski testified that about 2 p.m. on April 4 he was called to an office area where he was met by Curcio and Pothoff. Curcio told Majeski that he was terminated immediately because "you pled guilty to a felony." Majeski replied that it was a misdemeanor, but Curcio replied, "I don't give a shit what you plead to. As of this moment you're terminated." Further according to Majeski:

> I told them that I had talked to Dave Cook in detail about the situation. That I talked to several of the supervisors of my situation. I asked them if I could talk to Dave Cook, and he [Curcio] told me no. And then Harry Pothoff told me to clean out my locker now.

Majeski then left the premises.

Pothoff was called as a witness by the General Counsel. At the time that he testified, Pothoff had been fired by Respondent under circumstances that are discussed below. Pothoff testified that on the morning of April 4, Curcio came to his office and:

> Peter informed me that Joanne Preihs, the payroll clerk, had informed him that Dave Majeski's union activity had intensified. I was not aware of that; that he had done any more than we were already aware of.
>
> . . . .
>
> At that time I informed [Curcio] that the area that I had been made aware of that David had become quite active [in] was in the area of criminal sexual conduct because of the article that had come out in the paper probably three weeks prior to that day.
>
> . . . .
>
> [Curcio] asked me a couple times am I sure that he was guilty of criminal sexual conduct. And I assured him that there was a whole page full of people who had been found guilty.
>
> And to that his comment was, "Great, we've got him."
>
> . . . .
>
> He did ask me why I hadn't done anything about it. And I said I wasn't aware I should have or that I even could have. Because of [the fact that Majeski's publicized] activity [was] outside the plant.

Pothoff was not asked what union activity of Majeski's that he was "already aware of." Preihs' job title is actually payroll administrator, not "payroll clerk" as Pothoff testified. Preihs, who figures prominently in the cases of both Majeski and Sidock, and who testified for Respondent, is not a supervisor within Section 2(11) of the Act.

Further according to Pothoff, Curcio said that he was going to contact Respondent's corporate attorneys. At the end of the shift, Curcio ordered Majeski to an office where Curcio and Pothoff discharged him. Pothoff testified that he had known of two other employees who were convicted of sex crimes; both were allowed to continue working until their convictions and (immediate) incarcerations. Pothoff knew of one exconvict whom Respondent employed. That individual was hired in 1996, after serving an 8-year sentence for illegally selling drugs.

On cross-examination, Pothoff testified that the above-described newspaper article was his first knowledge that Majeski had been convicted of a sex crime. Specifically, Pothoff further testified that Majeski had never told him that he had been convicted or sentenced, or that he was required to wear a tether, or even that he had been charged with a sex offense. Pothoff further admitted that, when he came to work on March 17, employees were "abuzz" with talk about Majeski; someone paged Majeski "to the nursery"; and other employees posted cartoons about Majeski on the walls.

2. Majeski's case—Evidence offered by Respondent

Curcio testified that he made the decision to discharge Majeski on April 3, not April 4 as Pothoff testified. Curcio testified that on April 3 he came to the office of the Montague facility where he was met by Preihs. Preihs told Curcio about the

newspaper article which pictured and described Majeski as a convicted sex offender. This, according to Curcio, was his first knowledge of Majeski's conviction. Afterwards, Pothoff brought him a copy of the newspaper article and told him of the harassment and ridicule that Majeski had been receiving. Curcio called Roberts who agreed with Curcio that Majeski should be discharged, but Roberts told Curcio to confer with a company lawyer before doing so. Curcio was not able to reach the lawyer until noon April 4. Afterwards, he told Pothoff to have Majeski come to the office at the end of the shift. When Majeski appeared at the office, he admitted to Curcio that the article was true, and Curcio thereupon told Majeski that he was discharged. Curcio testified, "I discharged him because he was a sex offender and a child molester."

Curcio denied that any convicted child molester had been retained by any of the CMI companies. Curcio further denied knowing of any union activity at the Montague facility until the week after Majeski was discharged. (It was then, Curcio testified, that he was told that Majeski had appeared at the plant driveway to do some handbilling for the Union.) Curcio, however, did not deny Pothoff's testimony that Curcio told Pothoff (at least at some point) that: "Joanne Preihs, the payroll clerk, had informed him that Dave Majeski's union activity had intensified." Nor did Curcio deny that when Pothoff told him that Majeski had been active as a sex offender as well as a union protagonist, he replied to Pothoff, "Great. We've got him."

Roberts also testified that it was on April 3 that Curcio called him to report the Majeski matter, that he agreed with Curcio that Majeski should be discharged, and that he told Curcio to check with counsel before he did so.

Preihs testified consistently with Curcio that Curcio arrived at the plant on April 3 and it was then that she told him of the newspaper article. Preihs was asked if she told Curcio anything about Majeski's union activities before Majeski was discharged; Preihs replied, "I don't recall knowing about any union activity at that point."

Cook testified that Majeski discussed his child custody problems with him during the summer of 1996, and he admitted that Majeski then told him that during the custody proceedings "he was being accused of child molestation." Cook denied, however, that he knew that Majeski had been charged with a sex crime until the March 16 newspaper article appeared.

3. Majeski's case—Credibility resolutions and conclusions

Majeski's testimony that on April 3 he solicited Supervisor Carte for the Union is undenied, and I found it credible.

The General Counsel argues that Respondent had condoned Majeski's conviction of a sex crime by not discharging him after he told his supervisors of the conviction in September 1996. In this argument, the General Counsel relies on Majeski's testimony of what he had told Merrill, McCarthy, Pothoff and Cook. Majeski did not testify that he told Merrill and McCarthy about his conviction of a sex crime; Majeski testified that he told Merrill and McCarthy that he was wearing a tether because he had been convicted of some offense, and he offered to reveal the nature of that offense, but they declined to hear it. Majeski did, however, testify that he told Cook and Pothoff of his sex-crime conviction several months before Curcio discharged him. Pothoff contradicted Majeski, and I believe Pothoff. If, as Majeski testified, he had previously discussed the matter with Pothoff, he would have mentioned the fact as he was being discharged by Curcio. Instead, as Majeski testified, he argued to Curcio only that he had told Cook of the conviction. I do, however, believe and find that in September 1996 Majeski told Cook about his conviction of a sex crime; I do not believe Cook's testimony that Majeski only told him of the accusation of child molestation that was raised in the civil proceeding. Nevertheless, there is no evidence that anyone in management's chain of authority above Cook knew of the conviction until April 3, when Curcio found out about it from Preihs, or April 4, when Curcio found out about it from Pothoff.

Curcio and Preihs testified that Preihs told Curcio of the March 16 newspaper article on April 3. Curcio further testified that it was on April 3 that he decided to discharge Majeski and that he delayed until April 4 only because he could not reach his attorney. I do not believe this testimony. Pothoff was convincing in his testimony that: (1) on April 4 Curcio told him that he had learned from Preihs that Majeski's union activities had "intensified"; (2) Pothoff then told Curcio of the newspaper article; and (3) Curcio then expressed that he had had no knowledge of Majeski's conviction. As well as Pothoff's having a more credible demeanor, Curcio did not deny Pothoff's testimony of these three elements in their exchanges about Majeski.[4] I further credit Pothoff's testimony that after Curcio told him that he had learned from Preihs that Majeski was again engaging in union activities,[5] and Pothoff told Curcio that Majeski had been convicted of a sex crime, Curcio replied, "Great, we've got him." This was an expression of animus, and, coupled with Pothoff's credible testimony that it was made immediately after Curcio had learned of Majeski's union activities, it must be held that the General Counsel has presented a prima facie case that Respondent discharged Majeski in violation of Section 8(a)(3).[6]

Under *Wright Line*,[7] once the General Counsel has presented a prima facie case of unlawful discrimination under the Act, the burden shifts to Respondent to show that it would have discharged the employee even absent his protected activities. I find and conclude that Respondent has done so.

Whether Curcio first learned of Majeski's sex crime conviction from Preihs on April 3 or from Pothoff on April 4, according to the testimony presented by both the General Counsel and Respondent, Curcio decided to discharge Majeski only after he heard about Majeski's conviction of that sex crime. Even in a context of animus, a discharge for conviction of a sex crime, or any other reason independent of an employee's protected activities, is not a violation of the Act. As stated in *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966):

> The mere fact that an employer may desire to terminate an employee because he engages in unwelcome concerted activities does not, of itself, establish the unlawfulness of a subsequent discharge. If an employee provides an employer with a

[4] To the extent that Curcio's testimony can be said to beconstrued to contain relevant denials, I discredit it.

[5] Preihs was particularly incredible in her claim that she could not "recall" if she knew of Majeski's union activities at the time of his discharge. It is quite possible that Carte had told Preihs about Majeski's April 3 solicitation, but I need not decide where Preihs got the information about Majeski's union activities that she gave to Curcio.

[6] Another factor that fortifies the conclusion that the General Counsel has presented a prima facie case is the timing of Majeski's discharge; it followed Majeski's solicitation of Carte by only 1 day.

[7] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

> sufficient cause for his dismissal by engaging in conduct for which he would have been terminated in any event, and the employer discharges him for that reason, the circumstance that the employer welcomed the opportunity to discharge does not make it discriminatory and therefore unlawful. [Citations omitted.]

See also, *A&T Mfg. Co.*, 276 NLRB 1183 (1985). The General Counsel does not argue on brief that there is evidence of disparate treatment that would tend to show that Majeski's conviction of a sex crime was not a "sufficient cause" for his discharge under *Klate Holt,* supra. Nevertheless, I am constrained to point out that there exists no evidence of disparate treatment; once an employee was hired after serving a sentence for a felony, but that felony was not a sex crime; others had continued to be employed after they were charged with sex crimes, but not after they were convicted. And Majeski was discharged immediately after upper management, in the person of Curcio, first became aware of that conviction.[8]

In summary, although Curcio welcomed the news that Majeski had given Respondent sufficient reason to discharge him, Respondent did not violate the Act by discharging him for that reason. Accordingly, I shall recommend dismissal of the allegation that Respondent discharged Majeski in violation of Section 8(a)(3).[9]

B. Sidock's Case

1. Background and independent 8(a)(1) allegations

Sidock, a machine operator, was hired by Respondent in 1986. At the time of the events of this case Sidock worked on a production line that included about 12 other employees. On August 28, Pothoff discharged Sidock on orders from Cook.

Sidock testified that he began the union activity of soliciting signatures for the Union after Majeski asked him if he would be interested in union representation. Sidock further testified that Majeski asked him this "about a week or so before Dave Majeski got fired." This testimony was unquestionably false. Majeski, was quite clear (on cross-examination) that he began soliciting other employees only on April 2, or 2 days before he was discharged. There is, however, evidence that Sidock solicited employees for the Union in June, and there is evidence of employer knowledge of those solicitations. Pothoff testified that in June he knew that Sidock was prounion because some employees had told him that Sidock had been asking other employees if they were "interested in unions." Sidock agreed on cross-examination that he engaged in no union activities after June.

Sidock testified that in April he created a list of grievances that employees had brought to him, and he asked Merrill to arrange a meeting with Cook. Cook agreed to meet with Sidock and any other employees whom Sidock wished to bring with him. Sidock and 10 other employees met with Cook on April 24. As well as discussing assorted grievances, it is undisputed, several of the employees asked Cook during the meeting how much a forthcoming annual raise would be. Cook at first said that he could not tell the employees. Sidock testified that at the end of the meeting, he again asked Cook, "[H]ow much of a raise we're going to get?" Cook, according to Sidock, responded: "Marty I'll tell you this, what we're going to give you is more than a union would give you." Based on this testimony by Sidock, the complaint, at paragraph 7(a), alleges that Cook "impliedly promised to remedy grievances of its employees in an effort to dissuade them from assisting the Charging Union or selecting it as their collective bargaining representative."[10] One other of the employees who was in attendance at the April 24 meeting with Cook was Eugene Crowder. Crowder is a charging party in this proceeding, he is a prounion employee, and he figures prominently in other aspects of the General Counsel's case. The General Counsel, however, did not ask Crowder to corroborate Sidock's testimony about his exchange with Cook. Indeed, on cross-examination Crowder admitted, without qualification, that the only reference to a union that was made during the meeting was a denial by Cook that Majeski had been fired for union activities. None of the nine other employees in attendance testified. Finally, Cook credibly testified that the "only" reference that he made about "unions" was to a wage survey that had been conducted in the area. In view of the failure of corroboration by a witness who was sympathetic and readily available, and in view of the credible denial by Cook, I shall recommend dismissal of this allegation of the complaint.

Sidock further identified a letter that Respondent sent to all employees on May 8. The letter, signed by Cook, states in full:

> All CMI-Dearborn, Inc., Employees:
>
> Attached is a copy of the letter we have sent to the union organizer. CMI will protect you from any threats, coercion or scare tactics used by the union pushers to get you to join the union.
>
> If anyone tries these tactics on you, we urge you to report it to me or any other member of Management *immediately*. We will protect your right to be left alone.[11]

Based on Cook's letter to the employees, the complaint, at paragraph 7(b), alleges that Respondent violated Section 8(a)(1) by urging the employees to report contacts from the Union.[12]

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[8] See *Arlington Hotel Co.,* 278 NLRB 26 (1986), where the Board held that the General Counsel had not proved disparate treatment because the only supervisor involved in a discharge had not known of the treatment of other employees before he became a supervisor.

[9] Curcio was credible in his testimony that he never saw a form that Pothoff created that stated that Curcio had discharged Majeski because he was a "convicted felon." Moreover, it is irrelevant that during the discharge interview Curcio characterized Majeski's offense as a felony rather than a misdemeanor; it was still a sex crime.

[10] Respondent contends that no timely filed charge supports this allegation of the complaint. The allegation is, however, supported by the original charge over Sidock's discharge that was filed on September 19 in Case 7–CA–40233. In *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), the Board indicated, at fn. 7, that it follows several courts of appeals decisions that find sufficient relationships between charges and complaints in circumstances involving "acts that are part of the same course of conduct, such as a single campaign against a union" and acts that are "part of an overall plan to resist organization." Although I have concluded that Sidock was not discharged because of his union activities, the alleged unlawful promise, like the alleged unlawful discharge, is a part of the alleged course of violative conduct in which Respondent engaged in order to defeat the Union's organizational attempt.

[11] Capitalization and italics are original.

[12] Respondent also contends that no timely filed charge supports this allegation. Under *Nickles Bakery of Indiana*, supra, this allegation is also supported by the September 19 charge over Sidock's discharge. The alleged solicitation to report union contacts, like the alleged unlawful discharge of Sidock, is a part of the alleged course of violative conduct in which Respondent engaged in order to defeat the Union's organizational attempt.

In *W. F. Hall Printing Co.*, 250 NLRB 803 (1980), the Board held that such communications by an employer are violative of Section 8(a)(1) because they have "the potential dual effect of encouraging employees to report to respondent the identity of union card solicitors who in any way approach employees in a manner subjectively offensive to the solicited employees, and of correspondingly discouraging card solicitors in their protected organizational activities." Although requests to employees to report only threats may not constitute a violation of the Act,[13] Respondent's request to its employees included every contact that the employees might subjectively regard as "scare tactics" or "coercion." (Moreover, contrary to the contention of Respondent on brief, the employees are unlikely to understand that by its request that acts of "coercion" be reported, it meant only such actions as those that have been held to be coercive under Section 8(b)(1)(A) of the Act.) I therefore find and conclude that by its May 8 request to employees that they report contacts that include lawful organizational campaign activities, Respondent violated Section 8(a)(1).[14]

Sidock further testified that on June 26 he was summonsed to Respondent's personnel office where he was met by Pothoff and McCarthy. According to Sidock, Pothoff told him that he had been talking to "people on the floor." Then, according to Sidock:

> He came over to the table and he says to me, "Marty the perception is that you don't like to work here. The perception is you don't give a f—k about this place, the perception is you have a bad attitude."
>
> And I said "Harry could I say something?"
>
> He said, "Shut up." And he kept on saying, "The perception is that you don't want to work here." And he kept going on and on like that and then he'd pause. Then he'd look at me and he says, "How do you like it Marty?"
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> I said, "I don't like it Harry."
>
> He says, "Now you know how I feel."
>
> Then I said "Harry, if I didn't like this place, I wouldn't come in here everyday on time. If I didn't like this place, I wouldn't volunteer for all the overtime that you guys ask us to work, and work all the ungodly hours that you people ask us to come in and work."
>
> And I said, "As far as having a bad attitude when I go out that door in the morning, I have a good attitude, and within a few hours you people give all of us a bad attitude for the way that you treat us."
>
> Oh, yes. I said. "Harry, I'm going to prove to you people that you're wrong."

Pothoff then told Sidock that he could leave.

Pothoff testified (again, for the General Counsel) that, prior to June 26, Cook told him to discharge Sidock. According to Pothoff:

> It wasn't a very long conversation. Mr. Cook came into my office and said, "I don't care what it takes or what you have to do, I want Marty Sidock out of this plant."
>
> It was his [Cook's] feeling that Marty was continually disrupting production, getting the employees all riled, intimidating employees, because he didn't understand the incentive program. It seemed like there was an argument every single pay day over the amount of pay that he had received.
>
> And Mr. Cook said, "I've had enough of it. I want him out of here."

(Ultimately, Sidock was discharged for his complaints about Respondent's wage incentive program. That system is somewhat complex, and Pothoff indicated that he never fully understood it during the 9 years that he was Respondent's personnel manager at the plant.) Pothoff further testified that he then called Sidock and McCarthy to his office. The General Counsel did not ask Pothoff what was said during the meeting, but Pothoff did identify a memorandum that he created and entered into Sidock's personnel file after the meeting was over. The memo states:

> Meeting with Marty Sidock. Present Marty, Scott McCarthy and Harry Pothoff.
>
> I made it very clear to Marty his negative attitude had to stop. Constantly complaining about the company, its people and everything else. Told his services would no longer be needed if he couldn't come in and just do his job.
>
> He claimed we would all see a difference in him from this day forward.

Based on this document and the testimonies of Sidock and Pothoff, the complaint, at paragraph 7(c), alleges that Respondent, by Pothoff, "threatened its employees with discharge if they discussed with each other complaints about their terms and conditions of employment."

Respondent called McCarthy who testified that Sidock was lazy and that he and two other employees on the production line would not work when they should, and: "You got three guys that don't want to work, and the rest want to do something, and they're holding up the show. So it affects everybody's bonus." When McCarthy was asked to describe the June 26 meeting, he referred to Pothoff's above-quoted memorandum and replied: "Actually this is exactly what it was." On cross-examination, McCarthy testified that Sidock's complaining was only for his own benefit, but he admitted that some of the things about which Sidock had complained before the June 26 meeting were the production rates that were required for employees to earn incentives. McCarthy further admitted that the point at which Respondent set the rates affected the incentive pay for all 12 employees on the production line to which Sidock had been assigned.

As his memorandum indicates, Pothoff clearly threatened Sidock with discharge. Relying on McCarthy's testimony that Sidock was lazy, and Pothoff's testimony that Cook wanted Sidock discharged for disrupting production by getting the employees "riled" (because he did not understand Respondent's wage incentive program), one might argue that Pothoff warned Sidock solely because he had disrupted production. Pothoff's memorandum, however, does not mention any disruption of production that Sidock may have caused. More importantly, Pothoff's memorandum shows that he did not limit the purview of his threat to any of Sidock's complaining that may have had the effect of interrupting production. The unqualified memorandum shows that Sidock was being instructed to cease all complaining, not just that which may have interrupted production. As McCarthy admitted on cross-examination, the complaints that Sidock had been making included complaints about production rates that affected the incentive pay of all 12 em-

[13] Cf. *Liberty Nursing Homes,* 245 NLRB 1194 (1979).

[14] See also *Arcata Graphics*, 304 NLRB 541 (1991).

ployees on Sidock's production line. Such complaints, when discussed among employees, are wage discussions. Wage discussions among employees that do not disrupt production are protected activities.[15] Therefore, Pothoff's threat to discharge Sidock because of his wage complaints was, at least in part, a threat to discharge an employee because of his protected activities. By such threat, as I find and conclude, Respondent violated Section 8(a)(1).[16]

2. Sidock's discharge—General Counsel's evidence

Respondent's wage incentive program is administered by groupings such as production lines. Incentives from 0 to 20 percent of base wages per day are paid to each member of a given group, if that group qualifies for them. No member of a group can receive an incentive unless all members receive it. That is, all members of a group get the incentives on given days, or no member of the group gets them.[17]

The 12 employees of Sidock's production line were eligible, as a group, for incentive pay. Sidock testified that on August 27 he checked a plant computer and saw that for only 3 of the previous 4 working days had his production line received the full 20-percent incentive; on 1 of the days, the line received only a 17-percent incentive. Crowder was the leadman on Sidock's line. Sidock and employee Larry Schmidt went to Crowder and asked for an explanation of the discrepancy. Crowder did not know the reason, and he telephoned Preihs (again, Respondent's payroll administrator who is not a statutory supervisor). Crowder told Preihs that the employees on his production line were complaining about the incentive computations, and Preihs gave some explanation to Crowder.[18] Crowder then handed the receiver to Sidock and walked away. Sidock testified that he then asked Preihs why the production line had gotten only a 17-percent incentive, rather than the full 20-percent incentive, on 1 day of the previous week. Preihs told him that the employees on his production line did not get the full incentive that day because they had attended a meeting. Sidock told Preihs that he thought that the employees were given allowances for such meetings. Preihs replied that allowances were afforded to the employees for some meetings, but not for all, and the meeting on the day in question was not one of them. Further, according to Sidock, "I said, 'Oh, okay. That explains it. . . . Thank you,' and I hung up the phone."

The next morning, Sidock further testified, Pothoff called him to the personnel office and, in the presence of Foreman Merrill, discharged him. Although Sidock repeatedly asked Pothoff for a reason, Pothoff refused and told him: "Just leave."

Pothoff (who, again, had been discharged by Respondent and who was called as a witness for the General Counsel) testified that, although he discharged Sidock, Cook made the decision. Pothoff testified that on August 27 Merrill told him that "everyone was in an uproar again down on the line that Marty worked [on], that he [Sidock] had gotten Joanne Preihs, the payroll clerk, all upset again and it all over incentive." Pothoff then went to report this to Cook who said that he already knew about the situation. Pothoff told Cook that, "if he wanted to follow through with what we had planned before, now would be the ideal time."[19] Cook told Pothoff, "Go ahead."

Pothoff then went to Preihs and secured a written statement. In that statement Preihs first relates that Crowder called her and "stated to me that the guys on the line were questioning the incentive percents." She told Crowder that she would have to get back to him and, "At that point Marty Sidock got on the telephone and asked about Thursday's (the 21st) percent." Preihs then relates the explanation that she gave Sidock. Preihs' written narrative of her telephone encounter with Sidock concludes:

> Marty did not seem satisfied with this answer and continued to pressure me about what got paid incentive and what did not. By the time I hung up the phone, I felt a little intimated by Marty and the way he questioned the policies in regard to the incentive pay calculations.
>
> After I spoke with Marty . . . I then spoke with Dave Cook to let him know what was explained to Marty.

Pothoff testified that after receiving Preihs' written statement, he discharged Sidock. (Pothoff did not dispute Sidock's account of what was said during the discharge interview.)

Crowder testified consistently with Sidock about his calling Preihs on August 27. According to Crowder, "I told her that I had a situation down here with several employees and they were asking about their incentive and I didn't quite understand how to explain it to them, if she would explain it to them." Crowder then put Sidock on the telephone and walked away.

Crowder further testified that on the day after Sidock was discharged he was called to an office by Merrill. Merrill lambasted Crowder for not going through the "chain of command" and calling Preihs himself. Crowder replied to Merrill that he had been the one who had called Preihs, "because any time we had any questions Joanne's the one that handles payroll, I took it upon myself to call her, and that I thought I was responsible for Marty's termination." Merrill did not reply to this statement by Crowder. (In fact, as discussed below, both Cook and Preihs testified that employees such as Crowder and Sidock are free to discuss wage questions directly with Preihs.)

Further, according to Crowder, at the end of his August 29 meeting with Merrill, Merrill said that Sidock had not been fired[20] for union activities, but:

> He [Merrill] just said, "Have you heard of any union activities going on, Eugene, down on the line, since Marty's discharge?"
>
> And I told him, "No."

Based on this testimony by Crowder, the complaint, at paragraph 7(d), alleges that Merrill interrogated Crowder in violation of Section 8(a)(1). Merrill did not testify, and this testimony by Crowder stands undenied. By his questioning, Merrill requested Crowder to inform about his fellow employees' union activities, and he did so in the locus of managerial authority. This interrogation would have tended to have a coercive or restraining effect on the employee, and it was therefore violative of Section 8(a)(1) as I find and conclude.

[15] *Jeanette Corp. v. NLRB* ., 532 F.2d 916, 919 (3d Cir. 1976)

[16] The complaint, at par. 9, alleges that by Pothoff's threat Respondent also unlawfully "issued" a disciplinary warning to Sidock. Sidock, however, was not issued a warning notice. Moreover, to the extent that Sidock was orally warned by Pothoff, as well as threatened, the allegation is purely redundant of par. 7(c).

[17] See the above-quoted testimony of McCarthy as well as other testimony discussed below.

[18] See the testimonies of Crowder and Preihs as quoted below.

[19] The transcript, page 48, lines 1-2, is corrected to change "she" to "if he," and the word "and" is deleted.

[20] The transcript, p. 132, L. 23, is corrected to change "hired" to "fired."

Crowder further testified that shortly after Sidock was discharged, the Union conducted a meeting at Majeski's house, and several employees were in attendance. Then, during a work day in late August, he took an outdoor smoking break with several other employees and supervisors, including Pufpaff and Merrill. The group first discussed a production meeting that had been held that morning. Then, further according to Crowder:

> And after that Gary Pufpaff looked at me, and he says, "Oh, by the way, Eugene, talking about meetings, was you at that meeting for Dave Majeski and Marty Sidock?"
>
> I looked at him and said, "I don't have to call you outside now. You are outside." And I turned around and walked away.

Based on this testimony by Crowder, the complaint, at paragraphs 7(d) and (e), alleges that Respondent, by Pufpaff, interrogated employees and "created the impression among its employees that Respondent was engaging in surveillance of their activities on behalf of the Charging Union," all in violation of Section 8(a)(1). Pufpaff did not testify, and this testimony stands undenied. This questioning of an employee about his attendance at a union meeting, without letting the employee know how the supervisor was aware that such a meeting had been conducted, would necessarily have a coercive impact on the employee who was questioned and on any employee who thereafter heard of it. I therefore find and conclude that by Pufpaff's questioning of Crowder Respondent, in violation of Section 8(a)(1), interrogated an employee and conveyed an impression of surveillance of the employees' protected union activities.

3. Sidock's discharge—Respondent's evidence

On direct examination, Cook related several reports that he had received about Sidock's not always working when he was supposed to be doing so. Then Cook was asked and he testified:

> Q. Why did the company discharge Mr. Sidock?
>
> A. The day he was discharged I had a visit by our payroll administrator. She came to my office upset. She was very vocal. She does not come to my office very often and she deals with the bulk of our employees, because of her position as the payroll administrator.
>
> She came down and was very upset about Marty's conduct on a telephone call that she had had with him. She was upset about it and wanted some action taken. She wanted me to "get with Marty," I think was her words.
>
> And at that time, with all—with what had transpired in the past, because approximately—I'm guessing a few months prior to that we had other incidences where—with Marty. And I [had previously, on or before June 26] asked our HR manager [Pothoff] to sit down with him and be very frank with him and let him know where he stood, that people were getting tired of it and that we were not going to put up with it if it continued.
>
> That was only a few months prior to the last incident when our payroll came down to me with this concern. So I determined—at that time [of the Preihs incident] I called our HR manager [Pothoff] and informed him to fire Marty Sidock.

Cook did not testify what, if anything, Preihs told him that she wanted him to "get with" Sidock about. On cross-examination, Cook admitted that Sidock would not have been discharged, had it not been for his telephone conversation with Preihs.

Preihs testified that employees often approach her in her capacity as payroll administrator. Sidock had been one of those employees, and she had not made any complaint of Sidock's treatment of her (or any other employee's treatment of her) until August 27. According to Preihs:

> Last August I received a phone call from Eugene Crowder who is the production control leader on Job 1614 and he asked me to check into the incentive that the line had gotten for the previous week.
>
> And I told him I was right in the middle of calculating, or working on my payroll [and] that as soon as I got a chance I would look at it.
>
> And he said, "Well, we have a problem with one of the days that the incentive has been calculated for."
>
> And I said, "Well, what day, and what employee is questioning and I'll make sure that I take a double look at it before I process payroll tonight."
>
> With that Eugene was off the phone and Marty had gotten on, and he said that there was a problem with, I believe it was the [August] 21st incentive. The employees had earned rate for the time that they were on the machine, but then they had [a] Covey follow-up training [meeting] that morning, and they also had an employee meeting that day, and so he was questioning why they were getting 17 percent for incentive instead of the 20 percent for running rate.
>
> The more that I tried to explain to him, that the incentive did not get paid on meetings or on the Covey follow-ups, the more he argued that that wasn't anything that he chose to go to, that they were told to go to, and that he thought that they should still get 20 percent for the day, that I was taking money out of their pockets.

(Steven Covey is the author of "Seven Habits of Highly Effective People," which Respondent uses in a continuing employee education program.) Preihs further testified that during her conversation with Sidock, he was "rude" and made her feel "intimidated." When asked why she had testified that she had felt intimidated, Preihs replied, "I felt that my explanations weren't satisfying him and that he was making me begin to feel that I didn't know my job and I didn't know how his figures were calculated."

Preihs further testified that she was "upset" after the telephone conversation with Sidock, and:

> I stormed down to Dave Cook's office and told him that I needed Dave to go out and explain the incentive program one more time to Marty, that I had tried to explain the incentive for a day from the prior week, and that I didn't feel that Marty was understanding or that he was comprehending what I was trying to explain to him, that when Dave had a few minutes I would show him what I was explaining to Marty and asked him if he would go down to the line and talk with him himself.

Finally on direct examination, Preihs testified that she had not been "anxious" to write the above-quoted memorandum about the August 27 incident when she was asked to do so by Pothoff. When asked why not, Preihs testified:

> Because this is something that I did not want—my concern was that the people understand their paychecks and my only concern was that Marty understand what was

happening out there, and that he wasn't understanding it from me. I wanted someone else to try to explain it to him.

On cross-examination, Preihs testified that she thought that Sidock was "badgering" her by repeating questions and not listening to what she was saying. Preihs further testified that she explained in detail to Sidock how the wage incentive program worked; then she was asked and she testified:

Q. You understood that [program], and it was frustrating to you that you couldn't get him to understand that?

A. Right.

Q. That's why you went to Dave Cook was to get Dave Cook to maybe explain it to him, and maybe Marty would listen better to Dave Cook than he listened to you?

A. Yes.

Q. Now, you didn't ask the company to take any action against Marty Sidock—

A. No. . . . I just asked Dave if he would try to explain the incentive to him again.

Preihs confirmed that her memorandum accurately described the August 27 conversation between her and Sidock. Preihs further admitted that she did not indicate to Sidock during that conversation that he was upsetting her, and she admitted that she was not so upset by Sidock's conduct that it affected her work.

Finally, on redirect examination, Preihs was asked again why she had gotten upset during the conversation with Sidock, and she testified: "I felt like I didn't get through to an employee and that I—I guess I almost felt like I had failed to get my point across with trying to explain his incentive percents."

Through Curcio, Respondent introduced documentation that in 1988 Sidock was issued a 3-day suspension, and had a wage increase delayed for 90 days, "for threatening another employee." The nature of the threat was not disclosed by the documents. Sidock's annual reviews for 1993 and 1994 stated that he was not a good "team player," but he was paid at the top of his rate range for his job classification.

4. Sidock's discharge—Credibility resolutions and conclusions

As noted above, the General Counsel contends that Sidock was discharged because of his union activities in violation of Section 8(a)(3) and, independently, the General Counsel contends that Sidock was discharged because of his protected activity of concertedly complaining about the administration of Respondent's wage incentive program in violation of Section 8(a)(1).[21] As Sidock admitted, he last engaged in union activities in June, some 2 months before he was discharged. Although the General Counsel's witness, Pothoff, testified that he knew of Sidock's pre-July union activities at the time that he discharged Sidock on August 28, there is simply no evidence that Respondent used that knowledge as a basis for determining to effectuate the discharge. That is, there is simply no proven nexus between Sidock's known or suspected earlier union activities and his discharge on August 28. Rather, it is clear from the evidence adduced by both the General Counsel and Respondent that Sidock was discharged solely because of his complaints about the administration of Respondent's wage incentive program, rather than any of his known or suspected union activities. I shall therefore recommend dismissal of the allegation that Sidock was discharged in violation of Section 8(a)(3).

Contrary to Respondent's first contention, Sidock's complaint of August 27 was clearly voiced with, and on behalf of, other employees. Employee Larry Schmidt was with Sidock when he approached leadman (and employee) Crowder to ask about the incentive computations for the prior week. Moreover, as Respondent's witness Preihs testified, employee Crowder first called her and, "he asked me to check into the incentive that *the line* had gotten for the previous week." Crowder further told Preihs: "Well, *we* have a problem with one of the days that the incentive has been calculated for." And Respondent knew at the time that it discharged Sidock that Sidock was not acting alone; as quoted above, in the written report on which Cook and Pothoff acted to discharge Sidock, Preihs stated that Crowder had said that "the guys" were complaining about the computations.

As well as not acting alone, Sidock was not acting only for his benefit when he complained to Preihs. Under Respondent's wage incentive program, any success of complaint by any member of a group about the administration of the program would necessarily be shared by all of the members.[22] It would therefore be logical to conclude that any complaint about the incentive computations would be concerted. But such deduction is not required in this case. As Preihs testified, Sidock told her that "I was taking money out of *their* pockets." Specifically, Sidock did not accuse Preihs of taking money only out of *his* pocket.

I accordingly find and conclude that Sidock's wage complaint to employee Preihs was concerted. Sidock's conduct was also protected under the Act, unless Respondent has demonstrated that while engaging in that concerted activity Sidock engaged in conduct which rendered his activity unprotected. I do not believe Sidock's testimony that he meekly accepted the explanation that Preihs gave him, the first time she gave it. Nevertheless, there remains the issue of whether Sidock's conduct exceeded the protection of the Act, even though I credit Preihs' account of their telephone conversation.

In *Mast Advertising & Publishing*, 304 NLRB 819 (1991), an employee became belligerent and rude during a grievance meeting. The employer suspended her for that conduct. Citing *Thor Power Tool*,[23] the Board observed that the Act permits "some leeway for impulsive behavior which must be balanced against the employer's right to maintain order and respect." The Board held that the suspension violated Section 8(a)(1) because the employee's conduct during the grievance meeting "presented no threat to the Respondent's maintenance of order, respect, or discipline," even though the manager at the grievance meeting had found the employee's conduct to be personally insulting.

In her direct examination Preihs characterized Sidock's approach as rude and badgering, but she did not say what it was that Sidock did that was rude or badgering, except that he repeated his questions and he therefore forced her to repeat her answers. In her memorandum to Pothoff, Preihs also stated that

[21] On brief, the General Counsel does not contend that Sidock was discharged, in any part, for his protected concerted activity of presenting grievances to Cook on April 24; nor is there any evidence that such was the case.

[22] Conversely, as McCarthy testified, loafing by one employee "affects everybody's bonus."

[23] 351 F.2d 584, 587 (7th Cir. 1965), enfg .148 NLRB 1379 (1964).

she felt a "little intimidated" by Sidock, and on direct examination she testified that she felt "intimidated" by Sidock. When asked why she felt that way, Preihs replied, "I felt that my explanations weren't satisfying him and that he was making me begin to feel that I didn't know my job and I didn't know how his figures were calculated." Preihs repeated this answer in several different forms, and in none of them did she testify that it was because of any abrasive or abusive language that Sidock employed that she felt intimated. That is, it was only because of self-doubts that Sidock's question engendered in Preihs that Preihs felt intimidated. Entertaining such complaints as that which Sidock made, however, was part of Preihs' job.[24] If Preihs felt intimidated by Sidock's questioning that was neither abrasive nor abusive, it was unfortunate. Nevertheless, Preihs' subjective emotional response to Sidock's nonabusive questioning did not defeat the Act's protection of that questioning.

Additionally, Cook made the decision to discharge Sidock, but neither Preihs nor Cook testified that Preihs told Cook that Sidock had been rude, badgering, or intimidating before Cook made that decision. Preihs testified that she went to Cook only to get him to try to explain Respondent's complex wage incentive program to Sidock.[25] Cook, himself, testified that Preihs only asked him to "get with" Sidock. Preihs did not ask Cook to discipline Sidock; she did not ask Cook to ask Sidock not to be rude, intimidating, or badgering; she did not even ask Cook to tell Sidock that she had felt that she had been subjected to rudeness, intimidation, or badgering.

Just as was the case before the Board in *Mast Advertising & Publishing*, supra, during Sidock's course of concerted activity of making a wage complaint to Preihs, there was no threat to Respondent's maintenance of order in the plant, there was no threat to the degree of respect that Respondent wishes its employees to afford supervisors or each other, and there was no threat to the system of discipline that Respondent may lawfully seek to maintain. Sidock's activity of complaining about the administration of Respondent's wage incentive program to Preihs was therefore nothing more than a wage discussion between employees. As such, Sidock's activity was protected by the Act, and by discharging him for that activity Respondent violated Section 8(a)(1), as I find and conclude.[26]

C. Other Alleged Violations of Section 8(a)(1)

1. Procedural issue

The Union filed a petition for Board election on January 21, 1998. An election was scheduled by the Regional Office for February 12. The complaint alleges that on February 4 and 5 Witt (again, Respondent's principal owner and chief executive officer) gave election campaign speeches to the employees in which he made remarks that constituted violations of Section 8(a)(1). Specifically, paragraph 7(f) of the complaint alleges that in his speeches Witt: "impliedly threatened employees with a loss of their jobs through a plant closure or relocation of work if the employees chose to be represented for purposes of collective bargaining by the Charging Union," and paragraph 7(g) of the complaint further alleges that in his speeches Witt, "solicited grievances from employees, promised to remedy them and thereafter remedied employee grievances in an effort to dissuade employees from supporting the Charging Union and selecting it as their collective bargaining representative." In addition to these allegations of February 4 and 5 unlawful conduct by Witt, the complaint alleges at paragraph 7(h) that on February 9 Pufpaff (again, the plant superintendent) threatened the life of an employee in violation of Section 8(a)(1). The substance of these allegations will be discussed in sections below. First to be considered is Respondent's contention that all of the February allegations (as I shall call them) should have been severed from the instant proceeding and tried separately.

Respondent argues that it was not given the required time to prepare its defenses to the February allegations under Section 102.15 of the Board's Rules and Regulations and Statements of Procedure.[27] That section, inter alia, requires that complaints contain "a notice of hearing before an administrative law judge at a time and place therein fixed and at a time not less than 14 days after the service of the complaint." Respondent contends that the February allegations should have been severed from this proceeding because (1) the complaint that first alleged them, the second amended consolidated complaint and notice of hearing, was not issued until March 18; (2) that complaint did not reschedule the hearing which had previously been set for March 31; and (3) that complaint was not served on Respondent until March 19, only 12 days before the hearing. I denied Respondent's motion to sever the February allegations from this proceeding when Respondent made it at the hearing, but Respondent reasserts the motion on brief.

On brief, Respondent does not mention Section 102.17 of the Rules and Regulations, even though I cited that section when Respondent made its motion at trial.[28] Section 102.17 provides, inter alia: "*Amendment*.—Any such complaint may be amended upon such terms as may be deemed just, prior to the hearing, by the Regional Director issuing the complaint." At trial, I pointed out to Respondent that, although the February allegations were formally part of a separate complaint (the second amended consolidated complaint of March 18), they were, in essence, only amendments to a complaint that had been issued before; to wit: the amended consolidated complaint that had issued on November 24. Specifically, the 8(a)(1) allegations that the November 24 complaint contained were paragraphs 7(a) through (e), the pre-February allegations that are discussed above; the only substantive allegations that the March 18 complaint added were paragraphs 7(f) through (h), the February allegations. Certainly, Respondent would have had no objection to assert if on March 18 the Regional Director had issued only a brief order amending paragraph 7 of the November 24 complaint instead of issuing a "Second Amended Consolidated Complaint

[24] As Cook said of Preihs, "She deals with the bulk of our employees, because of her position as the payroll administrator."

[25] As noted, Pothoff, a personnel administrator, testified that he could not understand Respondent's wage incentive program.

[26] *Jeanette Corp. v. NLRB*, supra. On brief, Respondent seeks refuge in the fact that on June 26 Pothoff warned Sidock about such conduct. That warning, however, was violative itself because it included an instruction to cease engaging in concerted wage complaints, as I have concluded above. The only other warning that Sidock received was in 1988, or nearly 10 years before, and that warning (and suspension) was for threatening another employee. In no way does Respondent contend that Sidock threatened Preihs.

[27] Respondent also contends that by the scheduling of these allegations, it has been deprived of due process under NLRB Casehandling manual. The Board's Casehandling Manual is a set of instructions to the General Counsel's Regional Office personnel; it has never been held to confer substantive or procedural rights on the parties appearing before the Board.

[28] Tr. at p. 11.

and Notice of Hearing." In other words, Respondent's objection raises only an issue of form.

Moreover, the only supervisors named in the February allegations are Witt and Pufpaff. Witt is Respondent's chief executive officer and presumably available for purposes of investigation and preparation for trial. Additionally, Pufpaff was named in the November 24 complaint as a supervisor whose conduct violated Section 8(a)(1). Although Pufpaff was not employed by Respondent after February 12, Respondent makes no contention that he was not available for *additional* investigation and preparation for trial. Finally, in almost verbatim terms the February 6 charge filed by the Union in Case 7–CA–40639, and the February 12 charge filed by Crowder in Case 7–CA–40660, set forth the allegations of the alleged February conduct by Witt and Pufpaff. Presumably Respondent did not wait to investigate those specific charges until the second amended consolidated complaint and notice of hearing issued on March 18.

In view of these factors, I denied Respondent's motion to sever the February allegations at the hearing, but I invited counsel to reassert its motion when he could substantiate his claim of prejudicial inability to prepare a defenses to the allegations. Respondent made no attempt to substantiate its claim of prejudice at the hearing, and it makes nothing but a bare claim of inability to prepare on brief. I adhere to my ruling.

2. Alleged conduct by Witt

Jack Mick, who has been employed by Respondent since 1995, testified that he attended one of Witt's February meetings with about 20 other employees. According to Mick, Cook introduced Witt, and then Witt addressed the employees. Witt had some index cards in his hands as he spoke, but he referred to them only occasionally. According to Mick, Witt spoke for about 30 minutes. Mick gave an extensive accounting of what Witt said to the employees. Included in Mick's testimony was:

> And then he [Witt] said . . . he had a certain number. I think he said fifteen. Fifteen plants, and that there were five other plants besides CMI Dearborn that were machining plants.
>
> And he said that "I make the decisions where those jobs go. And if you vote a union in here, it'll make my job a whole lot easier."

Mick further testified that Cook spoke to the employees after Witt; then Witt spoke to the employees again. According to Mick:

> Then Mr. Witt wanted to know what our complaints were. He said he had an open door policy and we could always come to him and talk. And if we didn't get satisfied with the answer we got from the plant manager, that we could always go to him.
>
> Then he, again, solicited, you know, if there were any complaints. He said "Don't be afraid to do this. But, please, tell me what your complaints are. Let's talk about this."

Two of the employees in attendance spoke up and stated that they had been verbally abused by Pothoff. Specifically, according to Mick:

> And then Eugene Crowder spoke up in there.
>
> The only thing I can remember about Eugene was he said something about any time you run a problem to Mr. Pothoff, Harry would get upset and holler and scream and, you know, that type of thing.
>
> . . . .
>
> Mr. Witt said that "If any of my HR managers holler at my people, I'll fire his ass."

(Again, Pothoff was the plant's human resources manager; an example of his verbal abuse of employees is shown by the above account of his June 26 grilling of Sidock.) This testimony by Mick was corroborated by other employee-witnesses, including Crowder, who testified to similar statements by Witt in the meetings that they attended. The employees' testimony was not disputed by any witness called by Respondent, and I found it credible.[29]

As Cook admitted, shortly after the February 4 and 5 campaign meetings Witt told Cook, "Harry Pothoff needs to go." On February 9, Cook fired Pothoff.

Witt's telling the employees that he was the one who decided where work would go and if they selected the Union as their collective-bargaining representative his decision would be made "a lot easier" was a clear threat of plant closure in violation of Section 8(a)(1), as I find and conclude. Additionally, Witt's giving such a threatening speech, and then insisting that the employees tell him why they might want a union in the first place, was a blatant solicitation of grievances in an attempt to dissuade employees from selecting the Union as their collective-bargaining representative, and it was another violation of Section 8(a)(1), as I further find and conclude. Finally, I conclude that by firing Pothoff and thereby remedying the only grievance expressed after the unlawful solicitations (and doing so only 3 days before the scheduled Board election), Respondent further violated Section 8(a)(1). Respondent introduced testimony to the effect that, although Witt told Cook that "Harry Pothoff has to go," he really did not mean it. (Inconsistently, Respondent also argues that Pothoff was slated for discharge anyway.) Assuming the veracity of such testimony (which I do not), the issue under Section 8(a)(1) is the probable impact of Respondent's actions on the employees. After the detested Pothoff was removed from the plant on February 9, the employees did not know of the (post hoc, self-serving) reasons that Respondent advanced at trial. All the employees knew at the time of Pothoff's departure was that, in response to their unlawfully solicited grievance about Pothoff, Pothoff had been fired as Witt had promised. The probable coercive impact of Respondent's granting remedy for the unlawfully solicited grievance is therefore clear.

3. Alleged conduct by Pufpaff

As noted, Crowder was one of the employees who responded to Witt's February 4 and 5 unlawful solicitation of grievances by complaining about abuse by Pothoff. As further noted, on February 9 Pothoff was discharged by Cook. Crowder testified that also on February 9:

> Well, I was down in the production office waiting a rework procedure on some rework that needed to be done, and I got paged by one of my operators to come back down to the job, and as I was approaching job 1818, Gary Pufpaff

[29] Witt did not testify. Respondent did call Roberts who testified that Witt did read from some index cards, but he did not testify that Witt said nothing in addition to the words that were on those cards. To the extent that Roberts' testimony can be said to contradict that of the employees, I discredit it.

was coming into the main office, the front doors here, and he called me over.

And I came over to him and I said, "Yes, Gary, what can I do for you?"

And he looked me straight in the eyes and he says, "I'm surprised somebody hasn't killed you yet."

. . . .

I said, "What would make you say something like that, Gary?" And he turned around and walked away.

As noted, Pufpaff did not testify, and this testimony by Crowder stands undenied. Crowder further testified that immediately after his exchange with Pufpaff, he called the police to report a threat on his life. After the police came to the plant and left, Cook met with Crowder. Cook told Crowder that Pufpaff had admitted his statement, but that Pufpaff had asserted that he had been kidding; Cook further told Crowder that he had told Pufpaff that he should not say such things, even in jest; Cook apologized to Crowder for Pufpaff's conduct and told Crowder that Pufpaff did not speak for Respondent; and Cook further told Crowder that Pufpaff had been immediately suspended pending discharge. After saying these things to Crowder, Cook gave Crowder 2 days off with pay. On February 12, Roberts discharged Pufpaff.

At the time of the February 9 incident, Crowder had been wearing prounion insignia as he worked. Also, Pufpaff's prior interrogation of Crowder, as found above, is evidence that Pufpaff, specifically, had suspected Crowder's prounion sympathies. Nevertheless, there is nothing in Pufpaff's threat, or the surrounding circumstances, that would warrant a conclusion that Crowder was threatened (as late as February 9) because of his known or suspected union activities.

On the other hand, Crowder was one of those employees who responded to Witt's unlawful solicitation of grievances by complaining about the abusive treatment of employees by Pothoff. Immediately on the remedying of that grievance, Pufpaff threatened Crowder's life. Perhaps Pufpaff had liked Pothoff; if he had some other reason for the threat, he was not called by Respondent to so testify. At any rate, Crowder's complaint to Witt was made on behalf of any and all employees to whom Pothoff had been verbally abusive, and it was incontestably protected concerted activity. Pufpaff's threat to Crowder immediately on remedy of that concertedly expressed grievance would necessarily have a coercive effect on any employee who heard the threat, or heard about it.[30] I therefore find and conclude that Respondent, by Pufpaff, threatened Crowder with death because Crowder had engaged in protected concerted activities in violation of Section 8(a)(1).

CONCLUSIONS OF LAW

1. By the following acts and conduct Respondent has violated Section 8(a)(1) of the Act.

(a) On May 8, by letter, Cook requested that Respondent's employees report contacts that included lawful organizational campaign activities on behalf of the Union.

(b) On June 26, Pothoff threatened to discharge Sidock because Sidock had made protected concerted wage complaints.

(c) On August 28, Respondent discharged Sidock because he had engaged in protected concerted activities.

(d) On August 29, Merrill interrogated Crowder about his union activities and the union activities of his fellow employees.

(e) In late August, Pufpaff interrogated Crowder about his union activities.

(f) In late August, Pufpaff conveyed to Crowder an impression that Respondent was conducting surveillance of the protected union activities of Respondent's employees.

(g) On or about February 2, Witt threatened Respondent's employees with plant closure if they selected the Union as their collective-bargaining representative.

(h) On or about February 2, Witt solicited the grievances of Respondent's employees in an effort to dissuade them from selecting the Union as their collective-bargaining representative.

(i) On February 9, Respondent remedied the unlawfully solicited grievances of its employees by discharging Pothoff.

(j) On February 9, Pufpaff, threatened Crowder with death because Crowder had engaged in protected concerted activities.

2. Respondent has not otherwise violated the Act.

REMEDY

On February 6, the Union filed the charge in Case 7–CA–40639, thereby blocking the election then scheduled for February 11. On February 9, Roberts (again, the vice president of industrial relations of CMI International, Respondent's parent) and Cook gathered the employees and Roberts read them a statement that includes an express promise that Respondent will not "threaten plant closure, job loss, equipment removal or take any other discriminatory or unlawful acts because of employee exercise[s] of the rights employees are guaranteed in the [National Labor Relations] Act." The statement further promises that Respondent will not "solicit employee grievances or make an express or implied promise to remedy those grievances if the employees reject the Union." Also, copies of the statement were signed by Roberts and Cook and distributed to all employees. Citing *Passavant Memorial Hospital*, 237 NLRB 138 (1978), and *Gaines Electric Co.*, 309 NLRB 1077 (1992), Respondent contends that any unfair labor practice committed by Witt on February 2 and 3 has been remedied and no order may issue on the basis thereof. *Passavant* and *Gaines Electric*, however, clearly require that:

> For a repudiation to be effective, it must be timely, unambiguous, specific in nature to the coercive conduct, free from other proscribed conduct, and adequately published to the employees involved. In addition, it must set forth assurances to the employees that no interference with their Section 7 rights will occur in the future, and in fact there must be no unlawful conduct by the employer after publication of the repudiation.

Gaines Electric, 309 NLRB at 1081.

Assuming that the other requirements for an effective repudiation have been met, it is clear that the attempted repudiation was not "specific in nature to the coercive conduct [and] free from other proscribed conduct." Respondent's notice to the employees does not attempt to give the employees a specific assurance that they will not be requested to report contacts that include lawful organizational campaign activities; it does not attempt to give the employees a specific assurance that they will not be threatened with discharge because of their protected concerted activities; it does not attempt to give the employees a specific assurance that they will not be discharged because of their engaging in protected concerted activities; it does not attempt to give the employees a specific assurance that Respondent will not interrogate them about their union activities or the union

[30] Crowder did, in fact, testify that he told other employees about Pufpaff's threat.

activities of their fellow employees; it does not attempt to give the employees a specific assurance that Respondent will not create the impression of surveillance of their union activities; it does not attempt to give the employees a specific assurance that Respondent will not, in fact, remedy unlawfully solicited grievances (as well as just promising not to do so); and it does not attempt to give the employees a specific assurance that Respondent will not threaten them with death because they engaged in protected concerted activities. That is, under *Passavant* and *Gaines Electric*, the necessity for a Board-directed remedy of the unfair labor practices committed by Witt has not been obviated by Respondent's publications to the employees because those publications did not address the other unfair labor practices found herein. Finally, although Witt took the trouble to visit the Montague plant in order to personally threaten its closure, he did not take the trouble to visit the plant in order to repudiate that threat. Moreover, Witt did not even bother to sign the notice of putative repudiation that Roberts read and distributed to the employees. As Witt told the employees, he was the individual who decided which CMI plant got any available work. The employees were not likely to forget that the individual who personally threatened them with plant closure possessed that power. For this further reason, I also conclude that the unfair labor practices that Witt committed on February 2 have not been remedied.

Having unlawfully discharged an employee, the Respondent must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[31]

ORDER

The Respondent, CMI-Dearborn, Inc., Dearborn, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requesting that its employees report contacts that include lawful organizational campaign activities on behalf of the Union.

(b) Threatening to discharge its employees because they have engaged in protected concerted activities.

(c) Discharging its employees because they have engaged in protected concerted activities.

(d) Interrogating its employees about their union activities or the union activities of their fellow employees.

(e) Conveying to its employees the impression that Respondent was conducting surveillance of their protected union activities.

(f) Threatening its employees with plant closure if they select the Union as their collective-bargaining representative.

(g) Soliciting the grievances of its employees in an effort to dissuade them from selecting the Union as their collective-bargaining representative.

(h) Remedying grievances that it has unlawfully solicited from its employees.

(i) Threatening its employees with death because they had engaged in protected concerted activities.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Martin Sidock full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Martin Sidock whole for any loss of earnings or other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Martin Sidock, and within 3 days thereafter notify Sidock in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, Social Security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Montague, Michigan, copies of the attached notice marked "Appendix."[32] Copies of the notice, on forms provided by the Regional Director for Region 7 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to each current employee and former employee employed by the Respondent at any time since May 8, 1997, the date of the first unfair labor practice found.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification by a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found here.

[31] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[32] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board